BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of	)	
	)	
PUBLIC UTILITIES COMMISSION	)	Docket No. 2008-0273
	)	
Instituting a Proceeding to Investigate	)	
The Implementation of Feed-in Tariffs.	)	
	)	

THE SOLAR ALLIANCE'S AND HAWAI'I SOLAR ENERGY ASSOCIATION'S COMMENTS ON PROPOSED TIER 3 TARIFFS

AND

CERTIFICATE OF SERVICE

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Pursuant to this Commission's Decision and Order filed September 25, 2009 ("D&O") and Order Setting Schedule dated October 29, 2009, the Solar Alliance and Hawai'i Solar Energy Association (together, "SA/HSEA") respectfully submit their comments on the Proposed Tier 3 Tariffs filed on April 29, 2010, filed by the Hawaiian Electric Company, Hawaii Electric Light Company, Inc., and Maui Electric Company (collectively, the "HECO Companies'"), including the proposed Tier 3 rates, Schedule FIT Tier 3, and Schedule FIT Standard Agreement for Tier 3 ("proposed FIT Tier 3 Agreement" or "Agreement"). As explained herein, SA/HSEA support the HECO Companies' proposed Tier 3 rates. SA/HSEA emphasize, however, that we do not endorse the model or particular inputs the HECO Companies used, and that our assessment of the adequacy of the rates does not incorporate the major cost impacts of curtailment and the numerous burdensome provisions in the proposed FIT Tier 3 Agreement.

SA/HSEA, indeed, are particularly concerned that the proposed Agreement will be unfinanceable because of its pervasive bias against prospective FIT developers and investors and the basic goal of the FIT program of expedited and efficient (and thus less costly) procurement of renewable energy. Every gratuitous imposition on FIT applicants enhances the risk, and hence the cost, of projects, which eventually pushes up the costs to the ratepayer.

The HECO Companies made no secret of their opposition to Tier 3 projects (even as they advocated similar sized projects in their PV Host proposal). Having failed to stunt the size of FIT projects as they desired, the HECO Companies now seek to achieve the same result by taking every opportunity to make the development and financing of Tier 3 projects as difficult as possible. The Commission created FIT Tier 3 based on its express "desire to accelerate the adoption of renewable energy and reduce the State's dependence on imported fossil fuel." D&O at 43. SA/HSEA respectfully request the Commission to reject the HECO Companies' latest moves and allow FIT Tier 3, and the FIT program in general, to proceed and flourish as the Commission intended.

I. SA/HSEA SUPPORT THE HECO COMPANIES' PROPOSED TIER 3 PV RATES WITH SEVERAL CAVEATS.

SA/HSEA agree with the HECO Companies' proposed Tier 3 photovoltaic ("PV") rates of $197/MWh (using the 35 percent state tax credit) and $236/MWh (using the 24.5 percent state tax credit). See HECO Companies' April 29, 2010 Letter, at 24. Based on SA/HSEA's extensive industry expertise on PV projects, including their specific familiarity of the Hawai'i market, these proposed rates represent a reasonable initial estimate that should move the market for Tier 3 PV projects to full subscription of the FIT program at a reasonable cost to ratepayers, and fulfill the FIT program's purpose of facilitating and accelerating renewable energy development. SA/HSEA, however, offer this recommendation with several key caveats:

> (1) SA/HSEA do not endorse the particular model or inputs used by the HECO Companies, or waive any rights to contest the model or inputs should they be used in the future;
>
> (2) SA/HSEA emphasize that the HECO Companies' Tier 3 PV rate calculations, as well as SA/HSEA's assessment of the adequacy of the proposed rate, do not incorporate the cost impacts of any curtailment, and that not only curtailment itself, but even significant uncertainty regarding the utility's intention to curtail, will be a major, if not fatal, impediment to financing Tier 3 projects and, hence, the FIT program. If the HECO Companies' FIT rate calculations assume no curtailment, then FIT projects should not be subject to curtailment, or else the HECO Companies should be required to make clear to FIT project applicants how much, if any, curtailment they anticipate will occur. The energy finance community is not inherently opposed to curtailment – though it may be at odds with the state's clean energy goals – but is fundamentally unable to function with uncertainty surrounding the level of curtailment.
>
> (3) Likewise, the HECO Companies' Tier 3 PV rate calculations and SA/HSEA's assessment of the adequacy of the proposed rate, do not incorporate the cost impacts of the many onerous terms and conditions contained in the HECO Companies' proposed Tier 3 Agreement, detailed in Part III, infra.

First, while SA/HSEA concur with the HECO Companies' proposed Tier 3 PV rate (as with the proposed Tier 2 PV rate, see SA/HSEA's Tier 1 & 2 Comments, at 3-4), we wish to prevent any misunderstanding by the HECO Companies and clarify that such agreement with the proposed rates does not include agreement with the underlying model and inputs the HECO Companies used. The HECO Companies have incorporated certain inputs SA/HSEA and other intervenors have proposed (most notably, alternate use of the 35 percent non-refundable or 24.5 percent refundable state tax credits), but not other suggestions. Moreover, based on SA/HSEA's review of the model, it is unclear, even if each of the individual modeling inputs were perfectly aligned with actual Hawai'i market conditions, whether the model the HECO Companies used would produce results that conform with market realities.

In this context, SA/HSEA are able to agree that the HECO Companies' proposed Tier 3 (and Tier 2) PV rates provide a reasonable beginning estimate for this first phase of the FIT program, but withhold any endorsement or ratification of the particular model or inputs used by the HECO Companies. It bears noting that in future rounds of the FIT program, analysis of rates will be able to draw upon empirical data from actual FIT projects, which should diminish or obviate the need to resort to modeling to estimate the proper FIT rates, and that this eventuality gives SA/HSEA assurance in proceeding at this stage with a reasonable set of rates, albeit derived from an imperfect model.

As for the problem of curtailment, SA/HSEA again emphasize that the HECO Companies' proposed Tier 3 rate calculations do not take into account any curtailment -- even though the HECO Companies are in the best, if not exclusive, position to determine whether and to what extent such curtailment will occur. The Commission has expressly asked the HECO Companies: "What percentage of otherwise available hours for each technology and size tier do the HECO Companies project that they would curtail?" PUC-IR-311(c), filed February 19, 2010. The HECO Companies have avoided providing any information in response. See HECO Companies' Response to PUC-IR-311, filed March 4, 2010, at 3.

Without further information, SA/HSEA can only evaluate the HECO Companies' Tier 3 rate calculations at face value, based on no curtailment. If this premise is incorrect, however, then the proposed Tier 3 rates are unrealistic or even misleading as a project development incentive. If nothing else, the continued cloud of uncertainty surrounding this issue can severely curb or eliminate program uptake from the outset. To allow the success of the FIT program, either FIT projects should not be subject to curtailment, or the HECO Companies should be required to make clear to FIT project applicants how much, if any, curtailment they anticipate will occur.

Likewise, the many onerous provisions in the proposed FIT Tier 3 Agreement will impair or destroy the cost structure and economic viability of FIT projects. These provisions should be modified or deleted, as detailed below, see infra Part III.

- Note Regarding Dual Rates Based on the State Tax Credit

SA/HSEA reiterate our support for providing two alternate FIT rates for PV systems depending on which state Renewable Energy Technologies Income Tax Credit" ("RETITC") the particular project uses, i.e., the 24.5 percent refundable or 35 percent non-refundable credit. In their comments on the proposed FIT Tiers 1 and 2 rates, SA/HSEA established the need to account for both credits based on: 1) the plain language of the tax credit statute, Haw. Rev. Stat. § 235-12.5; 2) the legislative history, including the HECO Companies' own testimony in support; and 3) declarations of industry experts. See SA/HSEA's Tier 1 & 2 Comments at 7-10. The HECO

Companies, however, maintain their position of conditional support for use of the 24.5 percent refundable credit "[t]o the extent that parties in this proceeding are able to provide record support to the Commission for use of the 24.5% credit." HECO Companies' April 29, 2010 Letter, at 8. In response, SA/HSEA cite the support in their previous filing and incorporate it herein by reference.

II. SA/HSEA HAVE CONCERNS REGARDING THE PROPOSED TIER 3 SCHEDULE FIT

The HECO Companies' proposed Schedule FIT Tier 3 contains several provisions SA/HSEA have previously questioned or objected to. SA/HSEA reiterate and summarize our comments:

- Schedule FIT § B(2), Limitation against Multiple Facilities on a Tax Map Key ("TMK")

The HECO Companies still seek to grant themselves undefined discretion in deciding whether a "physical address," i.e., residential address or a single TMK may have more than one FIT facility of the same technology type. As SA/HSEA have emphasized, the only reason to limit multiple facilities on the same TMK would be to prevent "gaming" of the FIT tiers by artificially segmenting a large facility into smaller pieces. See SA/HSEA's Tier 1 & 2 Comments, at 12-13. The HECO Companies have confirmed this. See HECO Companies' Response to PUC-IR-314. SA/HSEA, however, have explained that there are many potential legitimate reasons in the public interest to allow multiple facilities on a TMK. See SA/HSEA' Tier 1 & 2 Comments, at 12-13. Given the undisputed, limited purpose of this provision, SA/HSEA recommend that it be narrowly tailored to prohibit multiple facilities "for the purpose of circumventing the

FIT rate structure," and that any decision on compliance be handled by a disinterested third party to eliminate any hint of impropriety.

- Schedule FIT § M, Dual Participation

As they did in the FIT Tiers 1 and 2 Schedule FIT, the HECO Companies seek to prohibit dual participation in FIT and "any other interruptible or NEM Programs," unless the non-FIT generators, in addition to being segregated electrically, are "used exclusively for standby generation and to participate in a Company interruptible service program." (Emphasis added.) This directly contradicts the Commission's D&O, which allows project owners to install additional generation to an existing project "so long as [the additions] are separately metered," id. at 21-22, 59. It also undermines the purpose of the FIT of integrating more renewable energy onto the HECO Companies' grids. This conflict may be avoided by changing the word "and" to the disjunctive "or," so that all non-FIT generators are not subject to the gratuitous and unreasonable condition that they are "used exclusively for standby generation."

- Baseline FIT Rate

SA/HSEA join other intervenors who oppose HECO's cramped reading of the Commission's D&O that the baseline FIT rate for other renewable technologies should be the singular lowest FIT rate for any technology in any tier, regardless of the size of the project. See HECO Companies' April 29, 2010 Letter, at 38. Yet again, the HECO Companies add their own slant to the D&O and lose sight of both the FIT's overall purpose of accelerating renewable energy development, and the baseline FIT's specific purpose of "encourag[ing] other cost-effective projects." D&O at 36. Thus, while it may be consistent with these purposes to limit the baseline rate to the lowest rate at the proposed project size, it makes no sense to limit the baseline rate to lowest rate in the entire program irrespective of project size. The Commission made this clear by equating the baseline rate to the lowest rate "at any given project size," id. (emphasis added). The HECO Companies' selective view of this language and intent is just another example of a general, recurring theme in which HECO fails to promote, or actually undermines, the FIT program at every turn.

III. THE PROPOSED TIER 3 AGREEMENT IS ONE-SIDED AND OPPRESSIVE, UNFINANCEABLE, AND CONTRARY TO THE PURPOSES OF THE FIT.

The HECO Companies' proposed FIT Tier 3 Agreement exceeds 100 pages, including attachments. The HECO Companies have indicated that they based this draft on a "model" power purchase agreement ("PPA") they have developed for Competitive Bidding projects. Those projects exceed the 0.5 to 2.7 or 5 MW range of FIT Tier 3 by an order of magnitude, and their PPAs contain an commensurate amount of volume, detail, and complexity. A standard PPA for much smaller FIT Tier 3 projects should not adopt the Competitive Bidding PPA as its model.[1] This is even more so given the FIT program's basic purpose of streamlining the procurement process.

More fundamentally, while the HECO Companies may deem this base draft a "model" for their own purposes, it is not a model based on actual negotiated PPAs.

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[1] A more relevant model, particularly for PV, would be the negotiated and approved PPA for the Hoku Solar project, see Solar Energy Purchase Agreement for As-Available Energy between Hawaiian Electric Company, Inc. and Hoku Solar, Inc., dated November 16, 2007, filed in In re Hawaiian Elec. Co., Inc., Docket No. 2007-0425, approved in D&O No. 24225, filed on May 13, 2008.

Actual PPAs begin with such a base draft, but ultimately undergo extensive bilateral negotiations over many months or even years to achieve a fair and workable balance between the contracting parties. The final product of such negotiations widely differs from the base draft or the HECO Companies' model.

Here, the intervenors do not have the opportunity to engage in such PPA negotiations with the HECO Companies over their proposed FIT Tier 3 Agreement, which goes against the spirit of the FIT in the first place. In effect, these comments, and the Commission's subsequent review and decision, provide the only available opportunity to seek and achieve a balance between the HECO Companies and any and all future potential FIT applicants. At the same time, the need to ensure such balance is just as compelling, if not more so, for the FIT program, which is supposed to facilitate and encourage renewable energy development much more than the standard bilateral PPA process, which is based to a much greater extent on seeking procurement outcomes that are in the ratepayers' economic interest. That is, the FIT program advances a new goal with much higher priority on ease of development and integration for renewable energy projects than was the case with previous projects using similar technologies and in similar size classes.

In this regard, SA/HSEA have several fundamental issues with the HECO Companies' proposed Agreement, as well as many specific concerns on various provisions. The fundamental issues are:

(1) As with the HECO Companies' proposed Tiers 1 and 2 Agreement, the proposed Tier 3 Agreement is far too lengthy, complex, and open-ended, which nullifies the purpose of the FIT and leaves potential developers in a similar or even worse position than trying to negotiate bilateral PPAs. As

much as possible, the Tier 3 Agreement must be streamlined and simplified, and open-ended provisions for future negotiation must be minimized or eliminated.

(2) Based on SA/HSEA's extensive, direct experience in developing PV projects in the Hawai'i market and elsewhere, the HECO Companies' proposed Tier 3 Agreement, as currently drafted, will be exceedingly difficult to finance. The FIT program will require a massive infusion of capital, most of which will need to come from out-of-state sources. Hawai'i already suffers disadvantages in attracting investment in relation to the larger projects and market opportunities available elsewhere. The HECO Companies' proposed Agreement will only further hamstring the Hawai'i FIT market through its one-sided, inhospitable terms. As detailed below, the proposed Agreement grants the HECO Companies too much unilateral discretion to terminate the contract, dictate or modify contract terms, and negatively impair FIT developers' economic bottom line.

In the limited time available, SA/HSEA have made their best efforts to examine the HECO Companies' lengthy proposed FIT 3 Agreement, realizing that the finalized document must be accepted by any FIT Tier 3 applicant on a "take it or leave it" basis. We review our specific objections and concerns in the order in which they appear in the document:

- <u>Whereas clauses, "Maximize Reliability"</u>

The language in the second and fourth introductory "Whereas" clauses signals at the outset the Agreement's skewed perspective, repeatedly declaring the need to "maximize" reliability. Setting aside the present lack of true standards for reliability in Hawai'i, reliability is something to be ensured or maintained, not maximized as an end-all. Meanwhile, the primary goal of the FIT, to dramatically accelerate the production of renewable energy from new sources, is nowhere to be found. The preamble of the Agreement should be modified to reflect the actual goals of the FIT program.

- <u>Definitions, "Good Engineering and Operating Practices"</u>

Good Engineering and Operating Practices ("GEOPs") is an industry term denoting clear standards that any utility or engineer can review, understand, and apply. As usual, however, the HECO Companies seek to modify this concept to include expansive language such as "considering Company's isolated island setting and other characteristics" and "reliability of an island system." This effectively reduces GEOPs to "HECO-EOPs," which the HECO Companies may dictate at will. A more transparent and objective definition of GEOPs should be developed and adopted, without the vague language above.

- <u>Article 1, "Parallel Operation"</u>

The language limiting the HECO Companies' obligation to allow interconnection and operation of a FIT project if it "adversely affect[s] Company's property or the operations of its customers and customers' property" is ambiguously broad and adds nothing beyond the other requirement that the Seller "comply with this Agreement," and should be clarified or deleted. Similarly, the requirement of "satisfactory completion, as determined solely by [the HECO Companies]" of the Acceptance Tests allows the HECO Companies to deny a FIT project for any or no reason. The HECO Companies' determination should follow at least a standard of reasonableness.

- <u>Section 2.1, "Purchase and Sale of Actual Output"</u>

The language "electric energy" in the second sentence should be changed to "Actual Output" to make clear that Actual Output is both purchased and sold pursuant to the Agreement.

- Section 5.1, "Seller's Weekly Maintenance Schedule"

The proposed requirement that Seller provide a weekly written projection of maintenance outages creates needless work. A requirement to provide one week prior notice of any maintenance outage should suffice.

- Article 6, "Forecasting"

These provisions, requiring constant, detailed forecasts and updates of energy production, impose unreasonable levels of busy work for Sellers and are unnecessary for PV in particular because information on the daily solar regime is widely available information that anyone can access themselves. Section 6.2, for example, requires weekly forecasts of deliveries "for each hour of the day for the ensuing week" and updates "any time information becomes available indicating a change in the forecast," as often as once per hour. Section 6.3 further requires Sellers to provide "the data and information required by Company to conduct its own annual and weekly forecasts," which simply imposes extra work on the Seller. Section 6.4 requires Sellers to install and maintain "appropriate" equipment for forecasting "to make Seller's forecasts as accurate as possible." The costs of such equipment, as well as the administrative time to conduct the forecasts and updates and provide the data, would be substantial, and it does not appear that the HECO Companies included these costs in their rate calculations.

The HECO Companies have not justified the need for such detailed, constant, and redundant forecasting for FIT projects, or the costs and burdens of such requirements. Indeed, if FIT projects are required to provide such detailed forecasts, then the HECO Companies should be required to provide FIT applicants and Sellers with forecasts of curtailment at the same level of detail.

- Article 8, Curtailment

SA/HSEA object to Article 8 of the proposed Agreement, euphemistically entitled "Continuity of Service," and actually dealing with curtailment. These provisions grant the HECO Companies virtually limitless ability to curtail energy deliveries, including "in any situation that the Company System Operator determines, at his or her sole discretion using Good Engineering and Operating Practices, could place in jeopardy the reliability of the Company System." Proposed Agreement § 8.1; see also id. § 8.4 (citing vague "factors such as the need to maintain the reliability and stability of the Company System"). The intervenors and Commission have already witnessed what arbitrary and excessive measures the HECO Companies are liable to impose based on their opaque concept of "reliability." See SA/HSEA's Comments on the HECO Companies' Proposed Reliability Standards, filed March 23, 2010. Such a limitless provision will render FIT projects unfinanceable.[2]

To enable the FIT program to succeed, the HECO Companies' ability to curtail must be subject to reasonable limits that are known beforehand so that financing can be procured at rates that reflect the actual minimum output. The HECO Companies' ability to curtail generation must also be subject to independent oversight. This should include an evaluation of the need for curtailment and the appropriateness of curtailing specific generators as opposed to others. Further, such independent reviews should be

[2] These curtailment provisions are particularly oppressive given that FIT Sellers are prohibited from selling any unused energy to third parties. See id. art. 20.

conducted on an expedited basis. The HECO Companies, again, should be required to make clear to FIT applicants how much, if any, curtailment they anticipate will occur for a specific project, prior to undertaking their Interconnection Requirements Study ("IRS").

- Section 8.2, "Negative Avoided Cost"

This recycles the same provision opposed by SA/HSEA and other parties in their Tier 1 & 2 comments, allowing the HECO Companies to curtail "during any period which, due to operational circumstances, purchases from the Seller will result in costs greater than those which the Company would incur if it did not make those purchases, but instead generated an equivalent amount of electric energy itself." This provision is antithetical to the goal and operation of the FIT, namely, promoting renewable projects with rates based not on avoided cost, but on project costs plus a reasonable rate of return. See D&O at 60-63. See also id. at 29 (distinguishing avoided cost rates under PURPA as a separate, alternative option to the FIT).

The language is also vague, failing to define "operational circumstances," and facially contradictory with the subsequent section 8.3, which states that article 8 "is not intended" to allow curtailment based on economic dispatch. The HECO Companies have maintained that this provision does not allow curtailment for economic reasons, HECO Companies' Response to PUC-IR-311(a), (b), but this only highlights the contradiction and begs the question why this provision is included at all.[3]

[3] The HECO Companies state this provision is based on a FERC rule under PURPA and Haw. Admin R. § 6-74-24, but the FERC rule does not apply to the Hawai'i FIT program, and Hawai'i statute has been amended to remove the avoided cost

At best, sections 8.2 and 8.3 create a morass of confusion; at worst, they fundamentally negate the FIT program. Either result is toxic to project developers, investors, and lenders. The provisions should be deleted in their entirety.

- Article 9, "Personnel and System Safety"

Similar to the objections to article 8 above, the language in article 9 is far too broad, granting the HECO Companies "sole discretion" to curtail when they determine the Facility "may endanger the integrity of the Company System or have an adverse effect on Company's [sic] other customer's electric service." This language could encompass virtually anything, to the point of duplicating the limitless standard under article 8. This provision should be tailored to apply to genuine issues of "personnel and system safety," see, e.g., Proposed FIT Tier 3 Agreement art. 1 (referring to "safety hazards" to property, employees, or customers), and decisions to curtail should be subject to independent oversight.

- Section 13.3, "Guaranteed In-Service Date"

While SA/HSEA agree with the proposal to make only the in-service date an enforceable deadline, which we understand is the conventional practice elsewhere, this provision makes no mention or allowance for the time required for the IRS, which in actuality is the primary driver of project delays. Despite repeated requests by SA/HSEA and others over years in this docket and other contexts, the HECO Companies have refused to specify standard procedures, timeframes, and costs for IRSs.

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restriction on power purchases, precisely to enable programs such as the FIT. See Haw. Rev. Stat. §§ 269-27.2(c), -91 (definition of "cost-effective") (as amended by Act 50 in 2009).

Given this huge unknown quantity dominating the project development timeline, as well as the harsh penalty of total loss of project investment and the reservation fee, 90 days is too short as the maximum grace period after the in-service deadline. Based on SA/HSEA's experience with Hawai'i project development, 180 days would be a more realistic and fair grace period.

Similarly, 180 days is too short as the maximum grace period in the event of Force Majeure. The Seller should be allowed 365 days in such situations, which is actually the timeframe specified as the maximum grace period in section 21.5 for termination damages.

(SA/HSEA assure the Commission that, in Hawai'i's renewable industry, the aphorism "time is money" applies just as much, if not more, than any other context and delays, in fact, can mean life or death for a project (determining, for example, its ability to secure financing or claim tax credits), and renewable project developers, therefore, have every incentive not to allow project delays to extend any longer than absolutely necessary.)

- Section 13.5, "Monthly Progress Reports," and Attachment L, "Reporting Milestones"

SA/HSEA understand and agree with the need to keep FIT project developers on track. The reporting system proposed in Section 13.5 and Attachment L, however, leaves much to be desired. First, the Milestones in Attachment L are left blank. As discussed above regarding the "Performance Standards" in Attachment B, this leaves the HECO Companies in control and the renewable energy developers in the dark and reduces the FIT to an (unbalanced) contract negotiation process.

This highlights, yet again, the need for greater consistency, transparency, and accountability from the HECO Companies on the IRS process, as SA/HSEA and others have repeatedly sought and urged. If FIT developers must comply with project milestones, then the HECO Companies should similarly be held to time limits for the IRS process. The IRS completion date should be added as milestone. Moreover, project milestones should be standardized to the extent possible by, for example, establishing some reasonable timeframe for the IRS and project milestones at set timeframes after the completion of the IRS.

Moreover, the proposed monthly reporting system is needlessly burdensome for both the developer and the HECO Companies. It envisions churning papers constantly, imposing administrative burdens both to generate the documents on the part of the developer and to review, organize, and keep track of all the submissions on the part of the HECO Companies. At this rate, document processing threatens to supplant execution of construction as the primary work of the project team. The HECO Companies do not indicate why they need all the detailed information that they demand from the Seller, or what they would do with it. Sellers should be required only to show fulfillment of each milestone by the specified dates.

Additionally, the proposed system of milestones requires Sellers to provide information that may be confidential, under terms negotiated with vendors (e.g., module pricing). Yet, such information does not appear to indicate in any particular way that the project is proceeding, or serve any purpose other than to compel disclosure of competitive information to the HECO Companies. To rectify this, the language should be modified simply to require submission of "proof or evidence of" fulfillment of each milestone, rather than the documents themselves.

Finally, the milestone list appears in places to be crafted not generically, but for wind projects in particular (see, e.g., references to "turbine(s)/generator(s)." SA/HSEA recommend the use of more generally applicable language or, if necessary, alternate language for different technologies.

- Article 21, "Force Majeure"

The need for a more flexible maximum grace period was discussed above in relation to section 13.3. Moreover, sections 21.3(A) and (B) should be modified to allow a "discovery rule," requiring notice within the specified timeframe from the date the non-performing party knew or should have known of the Force Majeure condition and effects.

- Article 23, Revisions to Performance Standards

This article poses serious concerns of potential burdens and abuse because it effectively allows material contract terms to be modified during the life of the contract, after its execution. While legitimate reasons may support revision of performance standards to accommodate new information or technologies, such measures should not be taken lightly.

First, as a matter of fairness and principle, if such revisions are allowed at all, then both parties should be able to request them and to initiate a dispute resolution. The current proposed language grants only the HECO Companies those rights. Id. § 23.7. Further, the proposed Agreement designates the Independent Observer retained under the Competitive Bidding Framework as the primary "Independent Evaluator" to resolve disputes, undoubtedly because the HECO Companies significantly control the Independent Observer selection process. Instead, the Independent Evaluator, like the Independent System Operators in the case of mainland grids, should be a person independently selected and solely answerable to the Commission, without any HECO Company influence.

- Article 28, Arbitration Only Provision

SA/HSEA submit that although many PPA contracts have arbitration only clauses, the FIT Agreements should not preclude relief from the Commission in the event of disputes, particularly in the initial, formative stages of the FIT program. Disputes may raise policy issues under the FIT program. The parties should have the opportunity to present these issues to the Commission, and the Commission should retain the authority to address such disputes.

- Article 14, "Credit Assurance and Security"

This entire portion of the proposed Agreement, which requires project developers to provide a $40 per kW of capacity "Operating Period Security," and grants the HECO Companies "sole" and "unilateral[]" discretion to draw on the money, raises serious concerns. The HECO Companies have not justified the need for such a security, and in such amounts. It also does not appear that the cost of obtaining a letter of credit is incorporated in the FIT Tier 3 rates.

The Commission's D&O specifies that Tiers 2 and 3 projects must "provide at least three months advance notice to the utility and the commission prior to ceasing operation for reasons other than force majeure events or be subject to penalties." Id. at 86. The Commission did not provide for other penalties, nor did it allow the HECO Companies, rather than the Commission, to impose and appropriate such penalties.

The provisions in article 14, along with the related "liquidated damages" provision, see infra discussion of article 16, are unwarranted and oppressive. They will impair the market for FIT projects by increasing the potential scope of losses and magnifying the risk inherent in the project, and will eventually push up future ratepayers' costs for acquiring power under the FIT.

- Article 16, Liquidated Damages

The HECO Companies propose provisions for liquidated damages allowing them to automatically collect "termination damages" of $40 per kW of capacity, regardless of any actual damages. See id. §§ 16.2, 16.3, 15.4.[4] Hawai'i law prohibits liquidated damages that bear no "reasonable relation" to "actual damages." See, e.g., Shanghai Inv. Co., Inc. v. Alteka Co., Ltd., 92 Haw. 482, 494-95, 993 P.2d 516, 528-29 (2000), overruled on other grounds, Blair v. Ing, 96 Haw. 327, 31 P.3d 184 (2001); Dias v. Vanek, 67 Haw. 114, 116-17, 679 P.2d 133, 135 (1984). The HECO Companies cannot circumvent this law by having the parties "agree and acknowledge" that the liquidated damages "are an appropriate approximation," Proposed FIT 3 Agreement § 16.3. These provisions are void and should be deleted.

[4] The HECO Companies also reserve the right to seek damages even without termination, id. § 15.7.

- <u>Sections 15.2 and 15.4, Termination and Withholding of Payments upon Default due to Bankruptcy</u>

Although the HECO Companies no longer seek to include a general assignment by Seller or involuntary bankruptcy as an "event of default," as they did in their proposed Tiers 1 & 2 FIT Agreement, <u>see</u> SA/HSEA's FIT Tiers 1 and 2 Comments at 15-16 (explaining the problems with the proposal), they seek in sections 15.2 and 15.4 the right to terminate the Agreement and withhold any payments upon default due to bankruptcy. SA/HSEA note that withholding payment in such a situation would harm the Seller's creditors, including potentially providers of debt to the project itself, and could contravene the law or public policy.

The HECO Companies have argued that it would be "more prudent" to simply abandon the Seller's facility and wait for the next project to come on-line. <u>See</u> HECO Companies' Response to PUC-IR-318. On the contrary, this solution seems fundamentally wasteful and would deprive the ratepayers and public of the benefits of already built and operating facility. As SA/HSEA have pointed out, since PV projects require minimal maintenance activity and expenditures, financial challenges to the project owner are unlikely to have any impact on the ability of the project to deliver power to the utility under the terms of the contract. On the other hand, the risk that the value of the FIT project and contract may be lost entirely in the event of bankruptcy will be a prominent stumbling block for lenders and make the projects even more difficult to finance, and increase financing costs and eventually future costs to ratepayers. <u>See</u> SA/HSEA's FIT Tiers 1 and 2 Comments at 15-16. Moreover, since the FIT per kWh prices are designed to allow developers to recoup the cost of investment, it is imprudent to require ratepayers to reacquire the FIT generation capacity for which they have already partially paid, particularly when the facility will continue to deliver power to the Company in any event. SA/HSEA recommend that termination of the Agreement should not be allowed due to bankruptcy of the project owner, but rather that such contracts, as assets of the developer or investment partnership, be preserved for sale to support creditors by the HECO Companies continuing to honor the Agreement.

- <u>Article 20, Prohibition Against Sale to Others</u>

SA/HSEA reiterate their opposition to the HECO Companies' proposed blanket prohibition on FIT projects from selling energy to others, even if their production is being curtailed. Sellers obviously should be required to provide all power available to the utility so long as the utility pays for it. There is also a valid interest (as well as the capability under existing technology) of requiring all sales to third parties to be immediately interruptible so that the utility always has access to the Seller's plant as a generation source, for instance to address frequency droops. The notion that a Seller can be both curtailed and prohibited from putting power produced but not wanted by the utility to an alternative economic use, however, is oppressive and counterproductive and has the adverse result of limiting competition with the utility for purposes such as charging batteries or producing hydrogen for electric vehicles. These technologies are already being developed and will become increasingly important in Hawai'i's ongoing shift to a clean energy economy. This provision should be circumscribed so as not to foreclose any such beneficial opportunities.

- <u>Article 24, Providing Financial Records</u>

Article 24 would require FIT developers to subject their financial records to audit by the HECO Companies. This threatens to overburden developers and expose their confidential information. In response to intervenor concerns and PUC questioning on a similar provision in the FIT Tiers 1 and 2 Agreement, the HECO Companies communicated their initial conclusion that such financial disclosure is not necessary. HECO Companies' Response to PUC-IR-317(b). The HECO Companies have not provided further information on this issue. The HECO Companies should be required to provide support for including this provision in the standard FIT Agreement. Moreover, if this provision is included, it should be modified to require the HECO Companies to provide verification to the Seller that an audit is required. Also, access to the information should be strictly prohibited from any and all persons not involved in the audit, not just the limited list of persons the provision identifies.

- <u>Section 30.20, "Change in Standard System or Organization."</u>

This section refers to changes in "any standard system or organization" or "any standard, system or organization," one of which seems to be a typo, but both of which are ambiguous. The language and intent of this provision need clarification.

- <u>Attachment B, § 3, "Performance Standards"</u>

This section superficially suggests that it will establish uniform standards for operating FIT projects that developers and investors may know in advance, but quickly dispels the prospect of such beneficial clarity by indicating that most if not all of the performance standards will be determined by the IRS. As usual, this leaves the HECO

Companies in control of the entire process and the renewable energy developers guessing on what the ultimate requirements will be and what they will be based on. In this connection, it bears noting that some of the issues addressed (e.g., under-frequency ride through) relate to grid-wide issues on which the results of the IRS on the distribution circuit have little or no bearing. In any event, the fundamental question is why are the proposed standards presented at all in sections such as 3.B, 3.C, 3.E, 3.F, 3.G, 3.I., when they may be unilaterally changed the HECO Companies, while other sections such as 3.D, 3.H are not subject to change at all.

Ultimately, Performance Standards are not actually being proposed in this section, and it would be more forthright to make clear either that Performance Standards should be determined on a case-by-case basis for each FIT project based on the HECO Companies' discretion and the vagaries of the IRS, or that Performance Standards for what is supposed to be a standardized PPA contract are actually in some sense standard across projects. Of course, the very meaning and definition of the FIT compel the latter approach. This especially holds where the FIT program allows projects only up to 5MW, in contrast to other, much larger projects exceeding this amount by an order of magnitude.

SA/HSEA have particular concerns on the requirement in § 3(C) for FIT projects to ensure certain ramp rates. This would ostensibly require additional equipment such as battery storage for every single Tier 3 project regardless of size or technology type. The HECO Companies' Tier 3 rate calculations do not include the cost of such equipment to control ramp rates, and it has never been a standard requirement as the

HECO Companies now propose for FIT projects. Any blanket requirement of such equipment should be rejected.

- Attachment G, § 5, Guarantee for Interconnection Costs

This proposed requirement of a standby letter of credit for 25 percent of the total estimated interconnection cost is superfluous and excessive because § 2(B) of the same Attachment G already requires the Seller to pay the total estimated interconnection cost by 30 days after the execution of the contract. One of the proposed effective dates of the letter of credit is 30 days after the contract execution date, id. § 5(B), at which time the issue would be moot. This provision should be deleted as unnecessary.

- Attachment G, § 6(C), "Restoration of the Land"

This section proposes the odd requirement that the Seller shall, at its expense, restore the land on which interconnection facilities were located to its condition prior to construction of the facilities within 90 days of termination of the Agreement. The disposition of the land after contract termination and removal of company-owned interconnection facilities does not concern the HECO Companies, but rather is a matter between the Seller and landowner (or exclusively for the Seller if it owns the land). Also, the cost of land restoration does not appear in the HECO Companies' rate calculations.

- Attachment G, § 9, "Land Rights"

Likewise, this section gratuitously requires the HECO Companies' prior review and acceptance of the terms and conditions of the Seller's land rights. Such approval is needlessly overbearing since § 1(B) of Attachment G already requires the Seller to provide the HECO Companies "a location and access acceptable to the Company for all Company-Owned Interconnection Facilities, as well as an easement, license or right of entry to access such [facilities]."

Section 9 also requires the Seller to "use commercially reasonable efforts to obtain perpetual Land Rights." The reason for this is unclear; nothing else in Attachment G seems to contemplate such perpetual rights. Moreover, the cost of such perpetual land rights were not included in the HECO Companies' rate calculations.

IV. CONCLUSION

In its D&O, the Commission established ambitious goals for the FIT program, including creating FIT Tier 3 based on the express "desire to accelerate the adoption of renewable energy and reduce the State's dependence on imported fossil fuel." Id. at 43. SA/HSEA and other parties have invested considerable time throughout this docket, and specifically on these Tier 3 issues, with the hope and conviction of fulfilling the PUC's vision. For the reasons expressed herein, SA/HSEA respectfully urge the Commission to continue to press forward towards Hawai'i's mandated and necessary clean energy future and make FIT Tier 3 a viable reality.

DATED: Honolulu, Hawai'i, May 20, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this date, a copy of the foregoing document was duly served by first-class postage prepaid mail and electronic mail to the following parties addressed as follows:

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